United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 20, 2000

TO : Martha Kinard, Acting Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 512-5012-8700
512-5012-9200

SUBJECT: Quietflex Manufacturing Co., L.P.
Case 16-CA-20257

This case was submitted for advice as to whether the Employer unlawfully terminated striking employees for refusing to leave its exterior premises.

The facts are set forth in the Region's Request for Advice. Briefly, the Employer discharged 84 striking employees, who were gathered outside its building to present a list of grievances to managers and to seek a meeting with them, when the strikers refused to comply with the Employer's demand that they either return to work or leave the Employer's property.

We conclude that the Employer violated Section 8(a)(1) and (3) by discharging the employees for refusing to leave its exterior premises.

The right of off-duty employees, including strikers, to be on their employer's exterior property to appeal to the employer regarding their grievances or to appeal to fellow employees must be analyzed under Tri-County Medical Center.[1] Under that test, a no-access rule for off-duty employees is valid only if it:

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[1] 222 NLRB 1089 (1976). See Caterpillar, Inc., Case 33-CA-10149, Advice Memorandum dated July 9, 1993; Barnard College, Case 2-CA-29350, Advice Memorandum dated September 18, 1996. With regard to access rights of striking employees to appeal to the public, the Board has held that Tri-County Medical does not apply. See Providence Hospital, 285 NLRB 320, 321-22, n. 8 (1987) and Hudgens v. NLRB, 424 U.S. 507 (1976). Advice has interpreted the Board's ruling in A-1 Schmidlin Plumbing and Heating, 312 NLRB 201 (1993), to mean that the Board will apply the non-employee access standard set out in Babcock & Wilcox to strikers appealing to the public, but not the restrictive interpretation of Babcock & Wilcox set forth in the Board's Lechmere decision. See Barnard College, supra.

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates and other outside nonworking areas will be found invalid.

Thus, off-duty employees' rights to be on an employer's exterior property differ from the rights of employees to engage in in-plant work stoppages and protests. The extent of the latter requires a balancing of employees' need to address immediate problems against the employer's legitimate interest in retaining control over or access to its production process or property.[2] Striking employees' refusal to leave the production floor or other areas inside the employer's facility, after a reasonable request by the employer to do so, may convert protected activity into unprotected activity.[3] That is not the case with regard to strikers who refuse to leave an employer's exterior premises after the employer asks them to do so.

Under the Tri-County Medical standard, the Employer violated Section 8(a)(1) when it denied the striking employees access to its exterior, non-working areas, and violated Section 8(a)(3) when it discharged the employees for refusing to comply with its unlawful order to leave. The Employer has presented no business justification for its refusal to permit employees' access to the parking lot or other exterior areas, and in fact had freely allowed such access in the past.

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[2] See, e.g., Pepsi-Cola Bottling Company Miami, Inc., 186 NLRB 477 (1970), enfd. 449 F.2d 824 (5th Cir. 1971) (in-plant sit-in); Waco, Inc., 273 NLRB 746 (1984) (protest in employee lunchroom).

[3] See Cambro Mfg. Co., 312 NLRB 634, 635-636 (1993) (employees were entitled to conduct, for a reasonable time, in-plant work stoppage which was peaceful, focused on specific job-related complaints and caused little disruption of production; employees lost protection upon failure to return to work or leave the plant after the second directive to do so, because no further interest was served by continuing the protest after management assured that their complaints would be considered in a few hours pursuant to past practice).

Accordingly, the Region should issue a complaint, absent settlement.

B.J.K.